BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

RAUL D. ALARCON	)	
Claimant	)	
V.	)	
	)	
OVERLAND CONCRETE CONSTRUCTION, INC.	)	
Respondent	)	Docket No. 1,066,371
AND	)	
	)	
HARTFORD INSURANCE COMPANY OF THE MIDWEST and WESCO INSURANCE COMPANY	)	
Insurance Carriers	)	

ORDER

STATEMENT OF THE CASE

Respondent and Hartford Insurance Company of the Midwest (Hartford) appealed the July 19, 2016, preliminary hearing Order entered by Administrative Law Judge (ALJ) William G. Belden. Angela Trimble of Kansas City, Kansas, appeared for claimant. Kevin J. Kruse of Overland Park, Kansas, appeared for respondent and Hartford. Kendra M. Oakes of Kansas City, Kansas, appeared for respondent and Wesco Insurance Company (Wesco).

The record on appeal is the same as that considered by the ALJ and consists of the the July 13, 2016, preliminary hearing transcript and exhibits thereto; the March 23, 2016, preliminary hearing transcript; the November 19, 2014, preliminary hearing transcript; the April 16, 2014, preliminary hearing transcript; the July 12, 2016, discovery deposition transcript of claimant; the November 14, 2014, deposition transcript of claimant; the October 2, 2013, deposition transcript of claimant; the July 12, 2016, discovery deposition transcript of Mary Carol Brown and exhibits thereto; the July 12, 2016, discovery deposition transcript of Patrick Brown; the December 23, 2015, Independent Medical Evaluation Report of Dr. Vito J. Carabetta; and all pleadings contained in the administrative file. By agreement of the parties, the aforementioned discovery depositions were made part of the record.

ISSUES

Claimant is seeking treatment for a hernia he alleges he sustained arising out of and in the course of his employment. In his application for hearing, claimant alleged he injured his back, abdomen, hips, both legs and other affected body parts each and every working day beginning March 1, 2013. Claimant later changed his position and alleged his hernia occurred as the result of a single acute injury on March 1, 2013, but filed no amended application for hearing.

Hartford provided respondent workers compensation insurance coverage from April 27, 2012, through April 26, 2013, and Wesco provided coverage commencing April 27, 2013. At the July 13, 2016, preliminary hearing, Hartford objected to claimant proceeding with his claim for a single acute injury. However, the discussion concerning Hartford's objection was held off the record, so it is unknown what relief, if any, Hartford requested. Hartford indicates more than three years have elapsed between claimant's March 1, 2013, injury and the July 13, 2016, preliminary hearing and cites K.S.A. 44-534. Hartford "asserts not only a statute of limitation[s] defense, but also asserts prejudice/unfair surprise and estoppel."[1] Hartford notes it was not present at claimant's first deposition on October 2, 2013.

The ALJ ruled:

> The Court first addresses the procedural objection raised by Respondent and Hartford. Claimant alleged he met with personal injury by repetitive trauma in his application for hearing, and an amended application was not filed. Claimant, however, consistently stated in prior proceedings he was alleging he met with personal injury by accident. Claimant testified in three depositions he met with personal injury by accident, and Respondent and Hartford's representative had the opportunity to examine Claimant about this subject at all three depositions. Respondent and Hartford presented two witnesses and exhibits to contest Claimant's allegations. Respondent and Hartford have been aware for over two years Claimant was alleging an acute injury by accident and presented evidence contesting Claimant's allegations. Respondent and Hartford have not been prejudiced because an amended application for hearing was not filed. Moreover, the technical rules of evidence and procedure do not apply in workers compensation proceedings. Respondent and Hartford's objection is overruled.[2]

Respondent, through Hartford and Wesco, denied claimant provided timely notice and proved he sustained a personal injury by accident or repetitive trauma arising out of and in the course of his employment.

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[1] Hartford Brief at 11.

[2] ALJ Order (July 19, 2016) at 4.

The ALJ found claimant gave timely notice to his supervisors of his injury by accident and proved he suffered a hernia arising out of and in the course of his employment. Hartford appealed. Claimant asks the Board to affirm the July 19, 2016, Order. Wesco did not file a brief.

The issues are:

1. Was Hartford denied due process because claimant was allowed to orally amend his application for hearing at the July 13, 2016, preliminary hearing from an injury by repetitive trauma to an injury by accident on March 1, 2013?

2. What is claimant's date of accident?

3. Did claimant provide timely notice?

4. Did claimant suffer a hernia by accident or by repetitive trauma arising out of and in the course of his employment?

FINDINGS OF FACT

Claimant testified with the assistance of a Spanish-speaking interpreter. Claimant indicated he is more comfortable using Spanish, but speaks some English and communicated in English with respondent's owners and some of his supervisors. He does not read or write English. He has worked for respondent as a finish concrete laborer since 2003. From approximately September 2011 to September 2012, he worked for respondent in the morning and another employer, JNV Flooring (JNV), in the afternoon. In 2013, he worked only for respondent. Claimant indicated he was usually off work at respondent the months of December through March, and returned to work when the weather got warmer.

Claimant testified he hurt himself the first day he returned to work in March 2013 after being off work for the winter. At the time, he was working at a FedEx facility in Missouri. He did not remember what day he injured himself, but he thought it was the last week of March or the first week of April. Claimant testified he was pulling on a straight edge, a bar approximately 16 feet long used to flatten or even the concrete, with another employee, Ivan, when he felt a ball develop in his inner thigh. Claimant also described his injury as feeling pain in his right lower abdomen.

Using English, claimant told his supervisor, Casey, what happened and Casey told him to go rest, so claimant went to the truck and rested for one and one-half to two hours. Claimant indicated he also told another supervisor, Cesar, that he injured himself and also told Ivan. Later, claimant told Casey he was hurting a lot and Casey sent him and several other workers home.

On May 9, 2013, claimant went to Dr. Victor Perez, his sister's doctor, for his injury. Three or four days later, he reported his hernia to Patrick Brown, respondent's owner, and his wife, Mary Carol Brown. They told claimant about Jaydoc, a free clinic, where he went on June 3 and saw Dr. Charles Rhoades. Claimant indicated he was told by Dr. Rhoades he had a hernia that needed surgical repair. He brought a written note from Jaydoc to respondent. Claimant has never completed anything in writing about his injury. Claimant indicated he continued performing his regular work until seeing Dr. Pedro A. Murati in October 2013.

Claimant testified that after he suffered his hernia, he completed a two-room addition to his house. His friends helped him and lifted all the heavy items and he did the carpentry work. The project took a year to complete. In December 2013, he and two other individuals installed flooring in his sister's house.

A preliminary hearing was scheduled for March 23, 2016. The parties appeared and claimant requested a continuance, which was granted. At that time, the following discourse took place between the ALJ and claimant's counsel:

> Judge Belden: Thank you. Claimant's alleging, well, it looked like according to the pleadings claimant was alleging injury from a series of accidents by repetitive trauma. However, it's my understanding claimant's actually alleging an acute injury by an acute accident. Is that correct, Ms. Trimble?
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> Ms. Trimble: Yes.
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> Judge Belden: And I believe the date of accident alleged by claimant was March 1, 2013?
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> Ms. Trimble: I believe so.[3]

Ms. Brown testified she was one of the owners of respondent and handled human resources, including workers compensation claims. According to Ms. Brown, in June 2013, claimant told Ms. Brown that he was having problems with his lower stomach and needed to have surgery, but did not state the condition was work related. They communicated in English.

Ms. Brown testified she first learned of claimant's alleged work injury in early August 2013, when respondent received a notice claimant was alleging an injury beginning March 1, 2013. She testified claimant has never reported his alleged work injury to her. Ms. Brown and her husband conducted an investigation. She determined claimant worked on March 14, 15, 16 and 20. The first day claimant worked on the FedEx job was

[3] P.H. Trans. (March 23, 2016) at 4.

March 28. According to Ms. Brown, she and her husband spoke to the supervisors on duty in March and they indicated no one reported an accident on March 28.

Ms. Brown indicated she keeps an incident log on each employee. A copy of claimant's incident log for April 9 through August 16, 2013, does not mention or indicate a work injury. She acknowledged not everything concerning claimant was placed in the incident log. According to Ms. Brown, claimant worked seven hours on March 28, 2013, and 9.75 hours the next day. He worked his normal hours and performed his regular job duties from April through July 2013.

Mr. Brown testified he saw claimant daily from March 28 through July 2013 and usually communicated in English with him by telephone prior to seeing him on the job. Mr. Brown was on the FedEx job site the majority of March 28, which was the day the job began. Claimant did not report a work injury to Mr. Brown on March 28. Nor did Mr. Brown observe claimant injure himself. No supervisor told Mr. Brown claimant suffered an injury on March 28. Claimant and other employees went home early because the job was completed.

According to Mr. Brown, about a week before claimant went to Jaydoc on June 3, claimant complained to him that his stomach was hurting. During the conversation, claimant never stated his stomach condition was work related. Mr. Brown recommended Jaydoc to claimant.

At the July 13, 2016, preliminary hearing, Hartford introduced an affidavit and file note of Jennifer Cardelli, a Hartford claims representative. The affidavit stated that on January 15, 2013, she spoke with claimant by telephone using a Spanish-speaking interpreter. Claimant reported he developed a hernia while performing physical therapy for a clavicle/shoulder injury he sustained while working for JNV in September 2012. Another exhibit introduced was a June 3, 2013, note of Dr. Rhoades, which stated claimant was there for moderate to severe lower abdominal pain caused by lifting a heavy air conditioner one month earlier.

Pursuant to the ALJ's order, Dr. Vito J. Carabetta evaluated claimant on December 23, 2015. Claimant reported he injured his right groin area on March 1, 2013, when he reached out with a straight edge to finish concrete. Dr. Carabetta noted claimant's story was quite clear and records were straightforward the hernia was related to a specific incident at work. The doctor diagnosed claimant with a right inguinal hernia and recommended additional medical treatment. Dr. Carabetta stated claimant was overdue for an inguinal herniorrhaphy procedure.

The ALJ found:

> The Court next addresses the compensability issues. First, the Court finds the more credible evidence tends to prove the incident described by Claimant on his

first day of work for Respondent in March 2013 occurred. Ms. Cardelli's allegations were not supported by medical records or accident reports that would have been generated if an injury occurred at a physical therapy facility, and Ms. Cardelli was not cross-examined. Although Mr. Brown testified no one reported Claimant suffered an injury on March 28, 2013, Ms. Brown testified Claimant's actual first day of work was March 14, 2013. The Court notes neither Casey, nor Cesar, testified in this matter. Claimant's testimony in these proceedings [is] that he suffered the hernia injury on his first day of work in March 2013. Although it seems unusual that Claimant would continue his normal work without pursuing additional medical treatment, and Dr. Rhoades' history contradicts Claimant's testimony, the Court finds it more probably true than not true that Claimant suffered an inguinal hernia while working for Respondent in March 2013. The Court also finds the opinion of Dr. Carabetta, the Court-ordered examining physician, that Claimant['s] hernia resulted from a work-related accident in March 2013 credible. The Court concludes Claimant met his burden of proving he sustained an inguinal hernia from an accident arising out of and in the course of his employment with Respondent in March 2013.

. . . Notice must be provided either to the employer's designee or to a supervisor or manager, and must include the time, date, place and particulars, and must evidence the employee is seeking workers compensation benefits or sustained a work-related injury. *See* K.S.A. 2011 Supp. 44-520(a)(2). In this case, Claimant's testimony that he notified two supervisors, Cesar and Casey, that he sustained a work-related injury on his first day back to work was uncontradicted. Although Ms. Brown testified the supervisors working in March 2013 told her no one reported a work-related accident, Ms. Brown may not have asked about March 14, 2013, and none of the supervisors actually testified in this matter. The Court finds Claimant notified supervisors he sustained a work-related injury on the day of the accident, which satisfies the notice requirement of K.S.A. 2011 Supp. 44-520(a). Claimant met his burden of proving he gave proper notice to Respondent.

. . .

In conclusion, Respondent and Hartford's objection is overruled. Claimant met his burden of proving he met with personal injury from an accident arising out of and in the course of his employment with Respondent in March 2013. Claimant met his burden of proving he gave proper notice. Respondent and Hartford shall provide Claimant a list of two qualified surgeons to provide the medical treatment reasonably necessary to cure or to relieve the effects of the work-related injuries Claimant sustained in March 2013, and Claimant shall select one to serve as the authorized treating physician. The testing, treatment and referrals made by the authorized treating physician shall be paid by Respondent and Hartford, subject to the Kansas Workers Compensation Medical Fee Schedule, until further order.[4]

[4] ALJ Order (July 19, 2016) at 4-5.

PRINCIPLES OF LAW AND ANALYSIS

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.[5] "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act."[6]

ALJ Belden correctly determined that Hartford was not denied due process because claimant orally amended his claim from an injury by repetitive trauma to an injury by accident on March 1, 2013. This Board Member adopts the legal analysis and conclusions of ALJ Belden on this issue. This Board Member also notes that claimant has always alleged he suffered a hernia in a single traumatic incident. At the preliminary hearing scheduled in March 2016, which was continued, the ALJ and claimant clarified that claimant was alleging a single acute injury. Hartford raised no objection at that time.

At the July 2016 preliminary hearing, approximately four months later, Hartford objected to claimant amending his claim to a single traumatic accident, but requested no relief other than a prohibition of the amendment. Hartford could have requested a continuance, but did not do so. Nor has Hartford shown it was prejudiced by the ALJ's ruling to allow claimant to amend his claim.

Hartford also argues the statute of limitations has run and invokes the doctrine of equitable estoppel. Those arguments were not raised before the ALJ. K.S.A. 2012 Supp. 44-555c(a), in part, states:

> The board shall have exclusive jurisdiction to review all decisions, findings, orders and awards of compensation of administrative law judges under the workers compensation act. The review by the board shall be upon questions of law and fact as presented and shown by a transcript of the evidence and the proceedings as presented, had and introduced before the administrative law judge.

The Board has frequently declined to exercise de novo review when an issue was not raised and limited review to "questions of law and fact as presented and shown by a transcript of the evidence and the proceedings as presented, had and introduced before

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[5] K.S.A. 2012 Supp. 44-501b(c).

[6] K.S.A. 2012 Supp. 44-508(h).

the administrative law judge."[7] The Board will not consider Hartford's arguments that the statute of limitations has run or that the doctrine of equitable estoppel applies.

Whether claimant provided timely notice is a more difficult issue because the date of claimant's accident is not entirely clear. Claimant contends he was injured on March 1, but testified he injured himself on the FedEx job the first day he returned to work in late March or early April 2013. Respondent's records show the first day claimant worked on the FedEx site was March 28. The ALJ determined claimant's accident occurred in March 2013, but did not specify which day.

It is necessary to determine a date of accident in order to determine if claimant provided timely notice. This Board Member concludes claimant's date of accident is March 28, 2013, the date he began working at the FedEx site. This is only a preliminary finding and additional evidence may be presented that proves a different date of accident.

This Board Member finds claimant provided timely notice and adopts the ALJ's analysis on this issue. Claimant testified he told his supervisors of his accident on the day it occurred. The only testimony to controvert this came from Ms. Brown, who spoke to both supervisors on duty at the FedEx job site on March 28 and neither of them indicated anyone reported a job injury on that day. In essence, that is hearsay testimony. Moreover, the ALJ impliedly found claimant credible by finding he provided timely notice to his supervisors.

This Board Member also finds claimant suffered a hernia by accident arising out of and in the course of his employment. Respondent did present evidence that claimant told a claims representative that he suffered a hernia during physical therapy and a doctor that the hernia occurred while lifting an air conditioner. The ALJ found claimant's testimony and the opinion of Dr. Carabetta regarding the cause of claimant's hernia credible. The ALJ's findings and reasoning on this issue are adopted and incorporated by reference.

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.[8] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2015 Supp. 44-551(l)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[9]

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[7] See K.S.A. 2012 Supp. 44-555c(a); *Byers v. Acme Foundry, Inc.*, No. 1,056,474, 2013 WL 6382905 (Kan. WCAB Nov. 21, 2013). See also *Hunn v. Montgomery Ward*, No. 104,523, 2011 WL 2555689 (Kansas Court of Appeals unpublished opinion filed June 24, 2011).

[8] K.S.A. 2015 Supp. 44-534a.

[9] K.S.A. 2015 Supp. 44-555c(j).

WHEREFORE, the undersigned Board Member finds claimant's date of accident is March 28, 2013, and otherwise affirms the July 19, 2016, preliminary hearing Order entered by ALJ Belden.

IT IS SO ORDERED.

Dated this ____ day of October, 2016.

HONORABLE THOMAS D. ARNHOLD
BOARD MEMBER

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Honorable William G. Belden, Administrative Law Judge